

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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AUG 20 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Annual Assessment of the Status of)	CS Docket No. 97-141
Competition in Markets for the Delivery)	
of Video Programming)	

REPLY COMMENTS OF UTC

Pursuant to Section 1.415 of the Commission's Rules, UTC hereby submits its Reply to certain of the comments that were filed on the Notice of Inquiry, FCC 97-194 (NOI), in the above-captioned matter. By this NOI, the FCC solicits information for its fourth annual report to Congress on competition in markets for the delivery of video programming. UTC's comments are limited to the issue of whether the FCC should request Congress to expand its regulatory authority over attachments to utility poles, ducts, conduits and rights of way.

A few commenters complain that the pole attachment rates charged by rural electric cooperatives and municipalities are in excess of rates paid to electric and telephone utilities that are subject to the FCC's pole attachment authority under Section 224 of the Communications Act.¹ Even assuming that some cable television operators pay attachment rates that are higher than a national average or that are higher than rates paid to "regulated" utilities, this does not indicate that such rates are unreasonable or a

¹ See, e.g., Comments of the National Cable Television Association (NCTA), pp. 42-46, and Small Cable Business Association (SCBA), pp. 18-21.

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“barrier to entry.” To the contrary, the wide variety of rates cited in the comments indicates that parties are freely negotiating rates for use of these assets, and that if anything, the rates that can be charged by regulated utilities are too low and are, in essence if not in fact, confiscatory.² Information submitted by NCTA demonstrates that when cable operators believe pole rental rates are too high, they have pursued alternative means of system construction, such as by direct burial.³ Similarly, the Comments of U S West indicate that it has been able to successfully negotiate away proposed contract provisions with which it disagrees.⁴ Just because other entities are not willing to subsidize the cable television industry is no reason for the Commission to request jurisdiction in order to mandate such subsidies.

SCBA attempts to show that small cable operators are particularly impacted by pole attachment rental fees because they often provide service in rural areas where the subscriber density per mile is very low.⁵ However, SCBA must also recognize that the burden to the utility in constructing and maintaining these facilities is even greater, and that the utility must also apportion these costs over the same small number of consumers.⁶ Further, even if the per-customer costs paid by rural cable systems are

² In its Comments in CS Docket No. 97-98, UTC has recommended certain changes in the FCC’s pole attachment rate methodology to bring regulated pole attachment rates closer in line with actual costs.

³ NCTA reports that a cable operator in Minnesota placed all of its plant underground instead of attaching to utility poles. Another cable operator trenched its own route rather than spend the estimated \$40,000 it would cost to upgrade the utility’s poles to accommodate the additional attachments. NCTA, pp. 42-43.

⁴ U S West, pp. 21-22 (citing the negotiations of its cable television subsidiary, MediaOne, with the City of Los Angeles and the removal of at least one provision with which MediaOne objected).

⁵ SCBA, pp. 16-18.

⁶ The Nebraska Rural Electric Association (NREA) states that its member systems average only about 2.29 customers per mile. NREA, p. 1. The Montana Electric Cooperatives’ Association (MECA) states that cooperatives in Montana average 2 customers per mile. MECA, p. 1. The National Rural Electric Cooperative Association (NRECA) states that cooperatives average, on a national basis, only 5 consumers per mile and that in some areas there is fewer than one consumer per mile. NRECA, p. 1.

higher than the per-customer costs paid by urban cable systems, this cannot be considered a market entry barrier that can or should be rectified through legislation. To the extent SCBA is advocating some sort of “universal service” program that would help to subsidize the inherently higher per-subscriber costs of extending services in low density areas, SCBA has not shown that cable television is an essential public service nor that the primary, or at least initial, burden of funding the program should be borne by consumers of electric and telephone service.

SCBA also complains that providers of Direct Broadcast Satellite (DBS) service pay no pole attachment fees.⁷ The fact that cable’s principal competitor uses a different delivery mechanism to avoid certain costs is irrelevant to the issue of whether pole attachment rates should be regulated. The FCC should not attempt to shift costs from the cable television industry to the utility industry simply because cable television must now compete with more efficient service providers. SCBA’s argument on this point discloses the cable industry’s true motive in raising the issue of pole attachments in this proceeding: to secure a subsidy in order to better maintain market share against DBS.⁸ The FCC should reject the cable industry’s suggestion that it should be further subsidized in order to forestall competition in the video services marketplace.

⁷ SCBA, p. 16.

⁸ The cable industry attempts to impute anticompetitive motives to electric cooperatives because of their involvement in marketing DBS. However, NRECA points out that less than 10% of electric cooperatives are involved in marketing DBS. NRECA, p. 2. Similarly, it is ironic that the cable industry imputes anticompetitive motives to municipal utility systems when there is a growing movement among incumbent telecommunications providers to forestall competition by securing state legislation to restrict or prohibit municipal involvement, directly or indirectly, in telecommunications. (See, for example, the Texas Public Utility Regulatory Act of 1995) Although such restrictions are blatant barriers to entry, the FCC’s failure to take prompt preemptive action under Section 253 has emboldened incumbents to promote such legislation in state houses across the country.

SCBA also attempts to make a point out of the fact that pole rental expenses are over and above the amounts that cable operators must pay for electric power and telephone service, and that when coupled with these other services, cable operators must pay a significant percentage of operating expenses to electric and telephone utilities.⁹ This is also irrelevant to the issue of whether utilities should be fully compensated for the use of their property. UTC assumes that cable operators also pay a significant portion of their operating expenses to satellite programming sources, but this does not give cable operators a right to take free or below-cost office space from these programming providers. Again, cable television is no longer a nascent industry and can no longer expect to be subsidized by others.

NCTA recites that one cable operator must provide a \$100,000 bond as part of its attachment agreement with an electric cooperative. However, the comments of the electric cooperatives indicate that such bonds are entirely reasonable given the cable industry's generally poor compliance with construction and safety standards.¹⁰ As the owners of the facilities in question, and as the parties primarily responsible for the maintenance of these facilities, it is only reasonable that pole owners have some means of readily ensuring compliance by attaching entities.

⁹ SCBA, p. 20.

¹⁰ See, e.g., comments of Little Ocmulgee EMC, p. 1 (citing its inability to have safety violations corrected by one cable system which has changed ownership at least four times in recent years), and Jackson EMC (citing the "reluctance" of some cable operators to meet NESC requirements when making attachments). See also NRECA, p. 3; MECA, p. 3

CONCLUSION

Just as Congress recently decided that rates for cable television service should be deregulated, it also reaffirmed that the rates for pole attachments charged by certain utilities should not be subject to federal regulation. The cable industry would, no doubt, prefer to have discounted pole attachment rates across the board, but there is no compelling reason why the cable industry should be further subsidized than it is already. UTC therefore urges the Commission to reject the suggestion that it request Congress for expanded authority over pole attachments.

Respectfully submitted,

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Dated: August 20, 1997